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January 3, 2011

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

Re: STB No. 42120, Cargill, Incorporated v. BNSF Railway Company

Dear Ms. Brown:

On May 24, 2010, Complainant Cargill, Incorporated ("Cargill") filed its Report on the Parties' Conference and Request to Adopt a Procedural Schedule. A copy of this filing is attached, along with BNSF Railway Company's ("BNSF") response to it. To date, the Board has not adopted a procedural schedule. In the absence of a schedule, this case has been in a holding pattern. By this letter, Cargill renews its request that the Board adopt a procedural schedule.

Also pending before the Board is BNSF's Motion for Partial Dismissal. Briefing on that Motion was completed on June 17, 2010 and awaits disposition by the Board.

Finally, the Board has stated that it "will expeditiously review any formal complaints related to fuel surcharges." *Rail Competition and Service: Hearing Before the H. Comm. on Transp. and Infrastructure*, H.R. 110-70 at 23 (2007). Cargill respectfully requests that the Board convene a conference with the parties to discuss the status of this case.

Respectfully submitted,



John H. LeSeur
An Attorney for Cargill

Enclosures

cc: Counsel for BNSF Railway Company

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May 24, 2010

VIA E-FILE

**Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-0001**

**Re: STB Docket No. 42120, *Cargill, Incorporated*
v. *BNSF Railway Company***

Dear Ms. Brown:

**Enclosed for filing in the above-referenced proceeding, please find
(1) Complainant Cargill, Inc.'s Report on the Parties' Conference and Request to
Adopt a Proposed Procedural Schedule, and (2) its Motion for Protective Order.**

Please provide electronic receipt of these filings.

Sincerely,



**John H. LeSeur
An Attorney for Cargill, Incorporated**

Enclosures

cc: Counsel for Defendant Per Certificate of Service

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

CARGILL, INCORPORATED)	
)	
)	
Complainant,)	
)	
v.)	Docket No. 42120
)	
BNSF RAILWAY COMPANY)	
)	
Defendant.)	
)	

**CARGILL'S REPORT ON THE PARTIES' CONFERENCE AND
REQUEST TO ADOPT A PROPOSED PROCEDURAL SCHEDULE**

Pursuant to 49 C.F.R. § 1111.10(a), counsel for Complainant Cargill, Incorporated ("Cargill") submits its report on the parties' conference and its request that the Board adopt the procedural schedule set forth in Attachment 1. In support hereof Cargill states as follows:

1. Cargill filed its Complaint initiating this proceeding on April 19, 2010. Cargill's Complaint seeks, *inter alia*, "the prescription of reasonable fuel surcharge practices and monetary damages." *Id.* at 1. Defendant BNSF Railway ("BNSF") filed its Answer on May 10, 2010.
2. The Board's Rules of Practice ("Rules") call for the parties in this case to "meet, or discuss by telephone, discovery and procedural matters within 12 days after an answer to a complaint is filed." 49 C.F.R. § 1111.10(a). As called for under the

Rules, the parties have engaged in a series of telephone discussions concerning discovery and procedural matters.

3. During the course of their discussions, Cargill and BNSF have agreed on the terms of a proposed protective order governing the exchange of confidential and highly confidential information in this case. Cargill is filing a separate motion asking that the Board adopt this protective order.

4. The Board's Rules also provide that "[w]ithin 19 days after an answer to a complaint is filed, the parties, either jointly or separately, shall file a report with the Board setting forth a proposed procedural schedule to govern future activities and deadlines in the case." 49 C.F.R. § 1111.10(a).

5. Cargill requests that the Board adopt the proposed procedural schedule set forth in Attachment 1. The proposed schedule calls for a 120 day discovery period, followed by evidentiary filings to be completed over the next 195 days. Cargill believes that this schedule can accord it sufficient time to present its case under governing Board standards,¹ assuming that discovery is carried out in a fair and expeditious manner. Cargill reserves the right to ask the Board amend the schedule if it becomes necessary in order for Cargill to properly develop or present its case to the Board.

6. Cargill also proposes that the Board incorporate into the procedural schedule governing this case the expedited discovery dispute resolution procedures set

¹ See, e.g., *Rail Fuel Surcharges*, STB Docket No. 661 (STB served Aug. 3, 2006 and Jan. 26, 2007); *Dairyland Power Cooperative v. Union Pacific R.R. Co.*, STB Docket No. 42105 (STB served July 29, 2008) ("*Dairyland*").

forth at 49 C.F.R. § 1114.31(a)(1)-(4). These procedures, which were promulgated to apply in stand-alone cost ("SAC") cases and simplified standards rate cases, call for expedited briefing of discovery motions, active involvement of the Board's staff, and expedited Board decisions. Counsel for Cargill believes that these procedures have worked well in SAC cases, and their application in this case should help facilitate the prompt and efficient resolution of discovery disputes. Adoption of these expedited procedures is also consistent with the Board's decision to use expedited discovery dispute resolution procedures in a pending unreasonable practice case. *See Arkansas Electric Cooperative Corporation – Petition For Declaratory Order*, STB Finance Docket No. 35305 (STB served Dec. 1, 2009) at 4 (appointing a Board employee to "act as a discovery facilitator").

7. Cargill has discussed the procedural schedule set forth in Attachment 1 with BNSF. BNSF has informed Cargill that it is not interested in agreeing to any form of procedural schedule until the Board first resolves a motion to dismiss the Complaint that BNSF plans to file with the Board. BNSF has also informed Cargill that it believes the Board's resolution of its motion to dismiss will help narrow discovery disputes.

8. Cargill submits that the best course here is for the Board to adopt a procedural schedule now and for this case to proceed in accordance with that schedule. Discovery disputes can be handled as they arise, and Cargill has proposed that the Board adopt expedited procedures to address them. Also, the Board looks with great disfavor

on motions to dismiss,² as well as on requests to delay the processing of cases pending resolution of these motions.³ Issuance of a schedule now is fully consistent with Board precedent and the national rail transportation policy. *See* 49 U.S.C. § 10101(15) (calling for “the expeditious handling and resolution of all [Board] proceedings”).

9. The Board’s actions in the *Dairyland* case also support Cargill’s request. In *Dairyland*, a shipper filed a complaint alleging, *inter alia*, that the Union Pacific Railroad Company’s (“UP”) fuel surcharge practices were unreasonable. UP moved to dismiss the complaint and, at UP’s request, the Board held the proceeding in abeyance pending its resolution of the motion. *Id.* at 2 (STB served April 29, 2008). The Board later denied UP’s motion and in its decision denying the motion “clarif[ied] the initial contours of [] a complaint” challenging the legality of a carrier’s fuel surcharge practices. *Id.* at 1 (STB served July 29, 2008). *Dairyland* was a case of first impression – it was the first fuel surcharge complaint case filed after the Board issued its *Rail Fuel Surcharges* decisions. In *Dairyland*, the Board departed from its normal practice and did not issue a procedural schedule until after it denied UP’s motion to dismiss. The Board

² *See Entergy Arkansas, Inc. v. Union Pacific R.R. Co.*, STB Docket No. 42104 (STB served Dec. 30, 2009) at 3 (“We have stated frequently that motions to dismiss are disfavored and rarely granted.”).

³ *See Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings*, 1 S.T.B. 859, 864 (1996) and 1 S.T.B. 754, 763-764 (1996); 49 C.F.R. 1112.2 (“[t]he filing of motions or other pleadings will not automatically stay or delay the established procedural schedule”); *AEP Texas North Co. v. BNSF Ry. Co.*, STB Docket No. 41191 (Sub-No. 1) (STB served Sept. 11, 2003) at 2 (denying BNSF’s request asking the Board to withhold issuance of a procedural schedule until the Board decided BNSF’s motion to dismiss).


did so in order to provide the complainant shipper with additional guidance on the governing legal standards. Cargill has the benefit of the guidance the Board provided in *Dairyland* so there is no need for the Board to delay the issuance of a procedural schedule in this case pending the Board's resolution of any motion to dismiss BNSF may file.

WHEREFORE, for the reasons set forth above, Cargill requests that the Board accept its report on the parties' conference and that the Board issue an order adopting the procedural schedule set forth in Attachment 1.

Respectfully submitted,

CARGILL, INCORPORATED

OF COUNSEL:

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Dated: May 24, 2010

Attorneys for Complainant

**CARGILL'S PROPOSED PROCEDURAL SCHEDULE
FOR DOCKET NO. 42120**

Day	Event
0	Board Serves Procedural Schedule; Discovery Begins
0+120	Discovery Ends*
0+210	Cargill Opening Statement
0+270	BNSF Reply Statement
0+315	Cargill Rebuttal Statement

* The expedited procedures set forth in 49 C.F.R. § 1114.31(a) governing motions to compel in rate cases considered under the stand-alone cost methodology or simplified standards will also apply in this case.

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May, 2010, I caused copies of
Cargill's Report on the Parties' Conference and Request to Adopt a Proposed Procedural
Schedule to be served electronically upon counsel for Defendant BNSF Railway
Company, as follows:

Samuel M Sipe, Jr.
Anthony J. LaRocca
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036


Daniel M. Jaffe

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

227160

CARGILL, INCORPORATED

Complainant,

v.

BNSF RAILWAY COMPANY

Defendant.

Docket No. 42120

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**BNSF RAILWAY COMPANY'S REPORT ON THE PARTIES' CONFERENCE
AND COMMENTS ON PROPOSED PROCEDURAL SCHEDULE**

Pursuant to 49 C.F.R. § 1111.10(a), counsel for Defendant, BNSF Railway Company ("BNSF"), and Complainant, Cargill Incorporated ("Cargill"), have conducted a conference to discuss procedural and discovery matters in this case. Because the parties could not agree on a proposed procedural schedule to govern future activities and deadlines in the case, each party is filing a separate report regarding the results of this conference and proposals with respect to the procedural schedule. Cargill filed its report on May 24, 2010. BNSF's report is set forth below:

1. BNSF advised Cargill in the procedural discussions that BNSF intends to file a motion to dismiss some of the claims raised by Cargill and that BNSF intends to file the motion for partial dismissal on or before May 28, 2010. BNSF proposed that the establishment of a procedural schedule be put off until the Board rules on BNSF's motion for partial dismissal. BNSF noted that such an approach would be consistent with the approach followed by the Board in *Dairyland Power Cooperative v. Union Pacific Railroad Company*, STB Docket No. 42105 (served April 29, 2008) (holding procedural schedule in abeyance pending ruling on motion to

dismiss). Cargill rejected BNSF's proposal and included a proposed schedule in its May 24, 2010 filing.

2. BNSF believes that the most efficient and cost-effective approach to a procedural schedule in this case would be to wait until the Board addresses the issues raised in BNSF's motion for partial dismissal before setting a procedural schedule. If the Board grants BNSF's motion for partial dismissal, the range of issues to be addressed in the case and the scope of permissible discovery will be significantly narrowed. By waiting to establish a procedural schedule, the parties can avoid engaging in expensive and time-consuming discovery and fact development that might ultimately prove unnecessary. Furthermore, an appropriate procedural schedule should be tied to the scope and complexity of the issues to be addressed which cannot be determined until the Board has ruled on BNSF's motion for partial dismissal. Therefore, the most practical approach is for the Board to stay the establishment of a procedural schedule until it decides BNSF's motion.

3. Cargill maintains in its May 24, 2010 filing that the actions of the Board in the *Datryland* case support the establishment of a procedural schedule at this time. However, as noted above, in *Datryland* the Board held the procedural schedule in abeyance pending its decision on the defendant's motion to dismiss in that case. Cargill acknowledges that the Board originally stayed the procedural schedule in that case but maintains that the guidance provided by the Board when the Board ruled on the defendant's motion to dismiss makes a similar stay of the schedule unnecessary here. Cargill is incorrect for two reasons.

4. First, as BNSF will explain in its motion for partial dismissal, the Board did provide guidance in *Datryland* as to the proper scope of a challenge to a railroad's fuel surcharge program, but Cargill disregarded that guidance in framing its challenge to BNSF's fuel surcharge

program in this case. The Board made it clear in *Dairyland* that there were limits on challenges to fuel surcharges that could be pursued through unreasonable practice claims, but Cargill has not respected those limits.

5. Second, the public record from the *Dairyland* proceeding makes clear that, even after the Board provided guidance on the permissible scope of challenges to fuel surcharges under the Board's unreasonable practice jurisdiction, the parties in the *Dairyland* case continued to have disputes concerning the appropriate scope of discovery. As a result of those disputes, the Board found it necessary to suspend the procedural schedule a second time despite the guidance that had previously been provided. *Dairyland Power Cooperative v. Union Pacific Railroad Company*, STB Docket No. 42105 (served Sept. 15, 2008).

6. If a procedural schedule is established at this time, there will very likely be disputes over the proper scope of discovery, as there were in *Dairyland*, that may not arise after the Board addresses BNSF's motion for partial dismissal. The most appropriate and efficient approach in this case is to avoid unnecessary litigation over discovery issues and to establish a procedural schedule after BNSF's motion for partial dismissal has been decided and after the proper scope of this case has been defined. That was the approach taken in *Dairyland* and there is no reason to depart from it here.

7. BNSF therefore believes that it would be premature to establish a procedural schedule at this time. However, if the Board were to establish a procedural schedule, the schedule proposed by Cargill is not appropriate. Cargill has provided itself with 210 days, including 90 days following the close of discovery, to prepare its Opening Statement while providing only 60 days for BNSF to prepare its Reply Statement. If Cargill anticipates that this case will present issues of such complexity that it requires 90 days following the close of a 120

day discovery period to prepare its evidence, BNSF should be provided at least 90 days as well to prepare its Reply Statement.

8. BNSF acknowledges that the parties have agreed on the terms of a proposed protective order and does not oppose Cargill's separate motion asking the Board to adopt the protective order.

WHEREFORE, BNSF requests that the Board wait to establish a procedural schedule until it has addressed BNSF's motion for partial dismissal, which BNSF expects to file on or before May 28, 2010.

Respectfully submitted,



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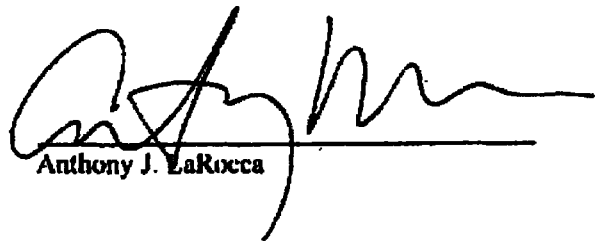
Dated: May 26, 2010

Certificate of Service

I hereby certify that on this 26th day of May, 2010, I have served a copy of the foregoing

Report on the following by hand delivery:

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